

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

| | | |
|-----------------------------------|---|-------------------------|
| RANDY HOLT, |) | |
| |) | PCHB No. 91-155 |
| Appellant, |) | |
| |) | |
| v. |) | FINAL FINDINGS OF FACT, |
| |) | CONCLUSIONS OF LAW |
| PUGET SOUND AIR POLLUTION CONTROL |) | AND ORDER |
| AGENCY, |) | |
| |) | |
| Respondent. |) | |

This matter is an appeal of Puget Sound Air Pollution Control Agency's (PSAPCA) Notice & Order of Civil Penalty No. 7434 (\$1,000) for allegedly causing or allowing an unlawful outdoor fire which was neither land clearing or residential burning, and Notice and Order of Civil Penalty No. 7435 (\$1,000), for allegedly refusing access to representatives of the Control Agency for inspection at 10621 Todd Road East in Puyallup, Washington. Appellant also appeals the reinstatement of a \$500 fine for alleged violation of Consent Order and Assurance of Discontinuance dated September 20, 1990.

A formal hearing was held July 29, 1991, before the Pollution Control Hearings Board in Lacey, Washington, with Chairman Harold S. Zimmerman presiding, and Annette S. McGee, Board Member.

Appellant Randy Holt was represented by David Bastian, attorney with McGavick, Graves, Beale and McNerthney. Attorney Keith D. McGoffin of McGoffin and McGoffin represented respondent Puget Sound

FINAL FINDINGS OF FACT,
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1 Air Pollution Control Agency (PSAPCA). Proceedings were recorded by
2 Bibi Carter of Gene Barker and Associates, court reporters. Witnesses
3 were sworn and testified. Exhibits were admitted and examined.
4 Argument was made. From the foregoing, the Board makes these:

5 FINDINGS OF FACT

6 I

7 Randy Holt owns two parcels of property along the northerly right
8 of way line of the Chicago, Milwaukee and St. Paul Railroad in Pierce
9 County, State of Washington, which are affected by actions in this
10 case. Exhibits A-1 and A-2.

11 II

12 On two triangular parcels of property (Exhibit A-1) McDonald
13 Holt, Inc., conducts its well drilling business. The parcel on which
14 a rented residence is located is where the burning took place. The
15 property is not used for commercial purposes, although vehicles, at
16 times, may be parked there.

17 III

18 Fruit trees are located within 60 feet of the residence. They
19 were pruned in April, 1991. On April 11, 14, 17 and 21, 1991,
20 appellant contacted the Pierce County Fire Protection District NO. 8,
21 Edgemont, and informed them that he would be burning on his property.

22 IV

23 Witnesses' testimony and evidence were unable to establish that
24
25

1 the fire exceeded the three foot by four foot size. Mr. Holt met the
2 requirements of Fire District NO. 8, including to have a safe setback
3 zone, that there be a hose or other means of containing the burn
4 pile. There was no burn ban in effect. Exhibit A-3.

5 V

6 In response to a complaint of an outdoor fire at 10621 Todd Road
7 East in Puyallup, Pierce County Air Pollution Inspectors Larry C.
8 Vaughn and Max D. Scarberry of PSAPCA arrived April 17, 1991, at about
9 10:05 a.m. to investigate. The inspectors did not present
10 documentation, credentials or photo identification of their Agency to
11 Mr. Holt. Mr. Holt became agitated, and asked the men to leave, which
12 they did.

13 VI

14 Michael A. Absher, Fire Inspector for Pierce County, that same
15 day inspected Mr. Holt's burns and those piles he wished to burn in
16 the future. Fire Inspector Absher observed that the piles were of
17 proper size, consisting of limbs cut from the trees adjacent to the
18 residence at the location.

19 VII

20 PSAPCA determined Mr. Holt's action to be a violation of Section
21 3.05 of Regulation I, by refusing entry to the control officers who
22 requested entry for an inspection. Inspector Scarberry sent a Notice
23 of Violation No. 27516 April 17, 1991, by certified mail to Mr. Holt.
24

VIII

On April 29, 1991, at approximately 8:50 a.m., Inspectors Vaughn and Scarberry responded to a complaint of an outdoor fire at 10621 Todd Road East in Puyallup, Washington. They observed an outdoor fire in progress in the orchard, viewing it through binoculars from across the Todd Road, about 1,000 feet distance.

IX

Inspector Scarberry took three photographs showing the fire. He later prepared Notice of Violation No. 27776, alleging violation of Section 8.02(a)(4) of PSAPCA's Regulation I, which deals with "causing or allowing an unlawful outdoor fire other than for land clearing or residential burning." It was sent by certified mail on May 3, 1991.

X

On June 4, 1991, PSAPCA sent by certified mail Notices and Orders of Civil Penalty Nos. 7434 and 7435, for (\$1,000) each for the two alleged violations.

XI

Appellant Holt contends he was conducting residential burning consistent with statute and regulations and was not in violation of Section 8.02 of PSAPCA's Reg. I or of RCW 70.94.750 on outdoor burning fires permitted, which deals with prohibited materials and permitted materials.

1 XIII

2 Consent Order and Assurance of Discontinuance dated September 20,
3 1990, provides for the suspension of a \$500 fine on the condition that
4 Holt not allow a fire containing prohibited materials for two years.
5 (Section 8.02 of PSAPCA Regulation I).

6 XIV

7 The Board takes notice of PSAPCA's Regulation I, governing air
8 pollution.

9 XV

10 Any Conclusion of Law deemed to be a Finding of Fact, is hereby
11 adopted as such.

12 From these Findings of Fact, the Board makes these:

13 CONCLUSIONS OF LAW

14 I

15 The Board has jurisdiction over these parties and these matters.
16 Chaps. 70.94 (Clean Air Act) and 43.21B RCW.

17 The air authority has the burden of proof.

18 II

19 This case focuses on two Notices and Orders of Civil Penalty,
20 Nos. 7434 and 7435 (\$1,000 each). The appeal also includes a \$500
21 fine for alleged violation of the Consent Order and Assurance of
22 Discontinuance (dated September 20, 1990).

III

First, we consider Notice and Order of Civil Penalty No. 7435.

Both RCW 70.94.200 and Section 3.05(b) of PSAPCA's Regulation I state:

(b) It shall be unlawful for any person to refuse entry or access to the Control Officer or a duly authorized representative who requests entry for the purpose of inspection, and who presents appropriate credentials, or for any person to obstruct, hamper or interfere with any such inspection. [Emphasis added.]

A fine of \$1,000 was assessed against Randy Holt for this alleged violation.

PSAPCA concedes the control officers did not present credentials to Mr. Holt. Even if it were assumed Mr. Holt knew who the men were, the inspectors conceded they did not fulfill the statutory requirement.

Property and private rights of individuals are well-guarded and protected by state and federal laws. If there is to be government intrusion into privacy and property rights, it is to be in accord with statutory laws.

PSAPCA has failed to conform to the mandatory statutory requirements. The \$1,000 fine of Civil Penalty Order No. 7435 therefore must be dismissed. See, Stanley Metcalf Shake Mill v. Olympic Air Pollution Control Authority, PCHB 87-95. It is not, too much, for the government's inspectors to provide credentials.

IV

Second, we look at the Notice Order of Civil Penalty No. 7434.

RCW 70.94.750 deals with "Limited Outdoor Burning - Fires Permitted" which deals with residential burning, and states:

The following outdoor fires described in this section may be burned subject to provisions of the program established pursuant to RCW 70.94.755 for any area and subject to city ordinances, county resolutions, and rules and regulations of fire districts and laws and rules and regulations enforced by the Department of Natural Resources:

(1) Fires consisting of leaves, clippings, pruning and other lawn and garden refuse originating on lands immediately adjacent and in close proximity to a human dwelling and burned on such lands by the property owner or his designee.

Section 8.02 of PSAPCA Regulation I, in pertinent part, states:

(a) it shall be unlawful for any person to cause or allow any outdoor fires; . . .

(2) containing garbage, dead animals, asphalt, petroleum products, plants, rubber products, plastics or any substance other than natural vegetation which normally emits dense smoke or obnoxious odors: or ...

(4) other than land clearing or residential burning.

There is no evidence Mr. Holt was burning any prohibited materials. The evidence is that clippings and prunings from the orchard trees nearby were burned. The Board concludes that this burning is consistent with the permitted fires as set forth in RCW 70.904.750.

V

The issue is whether the fires on the Holt property were "residential burning." Of the properties owned by appellant Holt, one has a house in which a renter lives. It is a "human dwelling." Mr. Holt does not perform commercial or business activities on the parcel of property on which the "human dwelling" is located.

As owner of the property, Mr. Holt does things to maintain the residence. Having the trees in the orchard pruned and trimmed would be included in such maintenance.

VI

Because Mr. Holt was conducting "residential burning", which is not a prohibited outdoor fire, and because he was not burning any prohibited materials, the Board concludes he is not in violation of the Assurance of Discontinuance and Consent Order signed September 20, 1990, Article 8, Regulation I of PSAPCA.

The fine of \$1,000 in Civil Penalty No. 7434 and the \$500 fine for alleged violation of the Assurance of Discontinuance should be dismissed.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters the following:

FINAL FINDINGS OF FACT,
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ORDER

Notices and Orders of Civil Penalty Nos. 7434 and 7435 of \$1,000 each, and the \$500 fine for violation of the Consent Order and Assurance of Discontinuance are REVERSED, and the fines DISMISSED.

DONE this 18th day of September, 1991.

POLLUTION CONTROL HEARINGS BOARD


HAROLD S. ZIMMERMAN, Presiding


ANNETTE S. M^CGEE, Member

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